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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-362

WINCHESTER TV CABLE CO., INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*
WHAG-TV INC., *Intervenor.*

TELEVISION ANTENNA CABLE, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents,*
WHAG-TV, INC., *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Winchester TV Cable Co., Inc. (hereinafter "Winchester") and Television Antenna Cable, Inc. (hereinafter "TELACO") request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 2, 1972.

OPINION BELOW

The opinion of the Court of Appeals is reported at —— F.2d —— and is annexed hereto as Appendix A, *infra,* p. 1a. The orders of the Federal Communications Commission are reported at 29 FCC 2d 432 and 30 FCC 2d 610 (Apps. B and C, *infra,* pp. 11a, 14a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1972 (Appendix D, *infra,* p. 20a). The jurisdiction of the Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Whether the Federal Communications Commission has the power to deprive the American people of the right to *receive* television signals from CATV systems that Federal law permits them to *receive,* in the same area, without CATV? And, whether the Federal Communications Commission's rule, that attempts to so *regulate television reception* and to discriminate against CATV subscribers, is invalid?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th and 14th amendments to the Constitution are set forth in Appendix E, *infra,* p. 21a, Sections 1, 301, 303(g) and 307(b) of the Communications Act of 1934, as amended are set forth in the body of this Petition, pp. 18, and 19, respectively.

REGULATIONS INVOLVED

The rule under review (47 CFR § 74.1103) is also set forth in Appendix E, p. 21a, together with the revision of that rule adopted by the Commission on February 2, 1972 and effective March 31, 1972, as amended

June 26, 1972, effective July 14, 1972 (CFR § 76.91, et seq.)

STATEMENT

These cases arose out of two orders of the Federal Communications Commission denying Petitions for a Waiver of its nonduplication or program exclusivity rule. In the formulation of these orders, the validity of the rule was challenged, and, alternatively, its application in this case has been arbitrary and capricious. The rule and the denials of its waiver, by the Commission, were sustained by the court below, on petition for review under the provisions of 47 USC § 402(a). The rule and the denials of its waiver, by the Commission, were sustained by the court below, on petition for review under the provisions of 47 USC § 402(a).

A. The Facts

Winchester Cable has operated a CATV system in Winchester, Virginia, since 1966, and TELACO has operated one in Front Royal, Virginia, since 1964. Both systems have always received and supplied WRC-TV, Channel 4, the Washington, D.C. National Broadcasting Company (hereinafter "NBC") affiliate, to their subscribers.

The residents of Winchester and Front Royal can and do receive WRC-TV and other VHF stations from Washington, D.C. and have continuously viewed these programs on home antennas for approximately 20 years. The Court below and the Commission have conceded this point. In January 1970, a new UHF station,

[1] A bonus affiliate broadcasts a full network schedule of programming but receives no compensation from the network. In June 1965, the Commission issued a Notice of Proposed Rule Making and a Notice of Inquiry in Docket No. 16041. The second part of that proceeding concerned the provision of network programs

WHAG-TV, Channel 25, Hagerstown, Maryland, began operation as an NBC bonus affiliate.[1] Both CATV systems carry WHAG-TV, as required by the Commission's rules.

WHAG-TV places a Grade A signal contour over Winchester and a Grade B signal contour over Front Royal, Hagerstown, Winchester and Front Royal are presently outside, by short distances, the Grade B contour of WRC-TV—although the Commission has granted WRC-TV's application for a permit to increase the height of its antenna, enabling it to place a Grade B contour over all three of the above communities. When this is done TELACO will no longer be required to protect WHAG-TV's signal because WRC's signal in Front Royal will be of equal priority with WHAG-TV. WRC-TV will have a lower priority in Winchester and, therefore, WRC-TV's signal will still have to be "blacked-out on the Winchester CATV system when WRC-TV carries the same program as WHAG-TV.

WHAG-TV triggered the program exclusivity provisions of the nonduplication rule by requesting that

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to "small market" or "overshadowed" stations, those at some distance from, but not entirely out of reception range of large city stations. This proposal was opposed by the networks. Comments and reply comments were filed and, on December 23, 1970, the Commission released its Report and Order in this proceeding (26 FCC 2d 772, 789, Appendix F, p. 28a). Rules were not adopted by this Report but the Commission's policy was made very clear that network affiliation in these fringe markets was unsatisfactory and must be improved. To this end, the networks were required to file reports and the proceeding was kept open for "whatever subsequent consideration and action may be indicated." Thus, a coersive policy was established far more effective than a rule. The beginning of operations and affiliations of WHAG-TV with NBC occurred during the pendency of this rule-making proceeding.

the two systems provide it with same day (simultaneous, under the revised rule) protection from duplication by certain other NBC affiliates, including WRC-TV.[2]

The Commission is fully informed that network programs are simultaneously duplicated to large populations and areas by television stations licensed by it, as shown by its Report and Order in Docket No. 16041 (Appendix F, p. 28a.)

In fact, the policy of the Commission is not only to encourage, but also to coerce, the networks to permit such duplication of programs by small market television stations to large areas and populations already covered by larger market television station[3] affiliates.

The area normally served by WHAG-TV within the Grade B contour (reference 100%) is supplied NBC programs by various television stations duplicating those of WHAG-TV (Joint Appendix, p. 25 et seq.). The number of duplicating signals and the percentage

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[2] The nonduplication rule is enforced by its terms only on demand by the station with a higher priority signal contour which gives the station with priority the opportunity to require nonduplication by some CATV systems and not others. The Commission's rules (47 CFR § 76.153) also gives *copyright owners* the right to demand exclusivity under some circumstances. This rule, in effect, circumvented this Court's holding in *Fortnightly* v. *United Artists Television, Inc.*, 392 US 390 (1968).

[3] Both the Commission and the court below *ignored* or didn't reach the basic discriminatory issue of why duplication of programs by television stations to large areas and populations promotes the public interest when receiving on a home-owned antenna and duplication by those same stations to miniscule portions of such areas and populations is contrary to the public interest when receiving on a more efficient CATV rented-antenna.

of the WHAG-TV Grade B contour area covered are as follows:

1 service WHAG-TV	2.7%
2 overlapping services	52.8%
3 overlapping services	29.8%
4 overlapping services	14.7%
2 or more services	97.3%
3 or more services	44.5%

Thus, in this case, the Commission has spawned an abundance of off-air duplication of network programs, while restricting it over CATV.

B. The Decision Below

The fundamental approach to this case by the Court below, as expressed in the first paragraph of its Opinion, was to solve the problem of "accomodating in the public interest the competing claims of a local television station and community television systems." The court met this challenge by disposing of the attack on the rule by *assuming* its validity and finding that its application in this case was not arbitrary and capricious.

The validity of the rule was attacked on the ground that (1) it violates Sections 1 and 307(b) of the Communications Act of 1934, as amended, because it does not accord equal treatment to wire and radio and does not provide a fair and efficient allocation of reception service; and (2) it violates the 5th and 14th amendments to the Constitution because it prohibits CATV-users the liberty of receiving the same signals that television stations provide to non-CATV users; it directly contradicts the policies of favoring simultaneous duplication of programs by television stations

over wide areas and large populations adopted in the Report and Order in Docket No. 16041; and expressly prohibits (at the election of the priority station) the CATV system from doing the very same thing in a small area that television stations are permitted and encouraged by the Commission to do over large areas.

In disposing of the arguments relative to the unconstitutional discrimination by the Commission, introduced by Docket No. 16041, the court regarded the Commission's Report and Order as an exhortation to networks to make their services available to small market stations. The court quoted with approval the Commission's claim that the conflicting policies were not inconsistent. Although the court stopped short of the sentence following its quotation, it obviously approved the contention of the Commission contained therein as follows:

> "Even if such [mere duplication of services to an area already actually receiving such network service] were the objective of Docket No. 16041, however, it would be entirely consistent with the intent of the non-duplication rule." (Appendix C, para. 8)

In short, the court approved the validity of a Commission policy (Docket No. 16041), of which the objective was to coerce duplication of programs off-the-air and simultaneously prohibit the reception by the public via CATV the identical duplicated programs in the same area.

The court further assumed that this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) affirmed unlimited power in the Commission to regulate CATV, whereas this Court limited Commission action to that "not inconsistent with law". The court

then concluded, by assuming the answer to the fundamental question on the power of the Commission to require the "blackout" of off-the-air television signals on CATV, as follows:

> "However, we need not decide whether this difference [transmitters of signals vs. reception of signals] provides a rational basis for the Commission's refusal to apply the same non-duplication policies to both CATV and to broadcasters. The Commission has not yet adopted any rule requiring a network to duplicate its programs in Winchester or Front Royal through multiple station affiliations. Nor do the CATV systems allege that Docket No. 16041, absent a rule, has coerced [4] duplication areas they serve. At best, as the Commission observed, the constitutional attack mounted by Winchester Cable and TELACO is premature." (But the Commission has licensed stations to duplicate network programs to the same areas and protected such duplication by threats. At the same time, the Commission has prohibited such duplication via CATV rules under which one of the duplicating signals must be blacked out. The facts contradict the court.)

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[4] The court apparently did not consider charges that WHAG-TV obtained its bonus affiliation with NBC as a result of the Commission's then pending inquiry in Docket 16041 (p. 13, Petitioners Reply Brief in the court below), nor was the court persuaded of the power of the Commission to "coerce" by using its power to adopt policy which is as effective coercion as law. Note the Commission's coercive language in 26 FCC 2d 796, para. 60:

> "60. In our view, for reasons stated herein, the public interest requires an improvement in the networks' performance in these respects, and we expect it to be improved in the near future. While we are not now adopting any rules in these areas, we will require the networks to report in the near future, by June 30, 1971, a period some seven months hence, on their policies and practices in the respects mentioned above. This proceeding is being kept open for the receipt of this information and whatever subsequent consideration and action may be indicated."

The court disposes of the attack on the nonduplication rule as violative of §§1 and 307(b) of the Communications Act of 1934, as amended, by stating that they are essentially the same as those previously considered by the court in *Wheeling Antenna Co.* v. *United States,* 391 F.2d 179 (4th Cir. 1968), and it would adhere to the views therein expressed.

It is significant that Judge Butzner, who wrote the opinion in this case, was a member of the panel which decided the *Wheeling* case. In that case Judge Bryan noted, in footnote 4,

> "that the question of whether the FCC has authority to regulate CATV is under review by the Supreme Court.... Accordingly, WACO does not argue that point here, but instead reserves it pending the decision of the issue by the Supreme Court."

At another point, the court noted that:

> "The assault was upon the priority of WTRF-TV. On that ground WACO [CATV] contested the appositeness, not the validity of the rule."

The court negatively and unwarrantedly concluded that:

> "Neither the rules nor their administration are shown to be unjust, including the particular rule now in suit."

Thus, even though the validity of the rule was not before the court in the *Wheeling* case, its validity was assumed, based on a statement by the court unsupported by facts or law, in that or any other record that:

> "... to insure its performance a station is entitled to some protection against dilution of its coverage

> through CATV's introduction of the same programs from more removed stations."[5] (Emphasis supplied.)

Thus, these unjustified assumptions are perpetuated in the case at bar as precedent. This is a most unorthodox method of establishing basic principles of law (by default) upon which an entire industry is regulated and the public inconvenienced.

The court brushed aside Petitioner's arguments in this case that the nonduplicating rule violated §§1 and 307(b) of the Communications Act of 1934, as amended, by accepting the assumed validity of the rule in the *Wheeling* case and accepted the conclusion of that case based on that assumption. That conclusion was as follows:

> "...we nevertheless accepted the nonduplication rule as a fair adjustment and accomodation of conflicting claims to first place in the public interest."

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[5] The finding by the court in *Wheeling* that WIIC, the lower priority station, placed a Grade A signal in *Wheeling*, upon which the decision rested, contradicts the basic determination by the court that CATV introduced the same programs from a more distant station. Those duplicating programs were already present in *Wheeling*. Grade A is almost as strong a signal as the principal community contour. An important basis of Winchester's case is that, if the signal is available to a citizen off-the-air, the Commission has no power, in law, to proscribe the type of antenna he uses. Otherwise, the Commission could, without any statutory sanction, prohibit the use, by citizens, of a VHF antenna in certain areas to further its policy of developing UHF. No provision of the Communications Act can be stretched that far. Finally, CATV systems do not "introduce" signals that are available off-the-air without CATV; only distant signals microwaved to an area can be fairly characterized as "introduced" by CATV. In this instance, we make no contention that the Commission does not have the means and authority to control that "introduction" by microwave. *Carter Mountain Transmission Co.* v. *FCC*, 321 F.2d 350, *cert. denied*, 375 U.S. 951 (1963).

The court, in the case at bar, finally concluded that:

> "... the Commission's efforts to assure that the role of CATV and television remained complementary were in keeping with the Communications Act of 1934."

In what way it is in accord with the Act, the court did not disclose. Not one section of the Act was cited [6] — only a series of cases in footnote 10. These cases do not support the conclusion that the Communications Act supports this rule.[7]

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[6] Certainly, neither Section 1 of the Communications Act of 1934, as amended, which places wire and radio on an equal basis, nor Section 307(b), which equates reception with transmission, support the rule requiring the reception antenna service to blackout a signal readily receivable in the community concerned. The Act (Sec. 303(g)) encourages the greater use of radio—not restrictions on its use by citizens when it is provided and intended for their use.

[7] Not one of the cases cited explains how television and CATV are kept complementary by prohibiting the reception, by the public, of signals licensed by the Commission and intended to be received off-the-air. It appears that the objective is to give an advantage to the network affiliated station with the strongest signal rather than to permit the public to receive all signals licensed to serve it with the liberty to choose the station that, overall, presents the best programs. In short, success determined by technology—not overall program content. If there is a problem, it is one of licensing transmission—not reception—of signals intended to be received. In *Wheeling Antenna Company* v. *United States*, 391 F.2d 179 (4th Cir. 1968) the court relied on Commission claims that Sections 1 and 307(b) (38 FCC 683, 699) of the Act cannot be met by reliance on a service delivering signals that cannot be made available to many people. In *Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238 (9th Cir. 1969), the nonduplication rule was held not to violate the First Amendment. The Court, in effect, also approved the Commission's "fear" that, if the public were able to clearly view signals not intended for delivery to them, it would render off-the-air stations uneconomic (38 FCC 683, 700). Both of these cases rely on the Commission's 1965 Report and Order adopting rules for microwave served CATV (38 FCC 683) which does not

REASONS FOR GRANTING THE WRIT

The Commission has no authority to restrict *reception* of television signals that it has licensed to serve the area in question or to discriminate against CATV viewers and, therefore, there is no responsibility to which such authority is reasonably ancillary.

The Decision below clearly involves an important question of Federal law which has not been, but should be, settled by this Court. The Decision below involves the validity of a fundamental power asserted by the Commission to adopt an onerous regulation of cable television which is neither desirable[8], necessary or effective to protect the station predicted to place the

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apply to off-the-air service. In *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187 (3rd Cir. 1968), the Court relied on earlier hearings of the Commission to the effect that CATV could discourage local television. It is clear from the context that the court again relied on the same microwave distant signal policy to govern *non*-microwave off-the-air CATV service. The court, without rationale, merely asserted that the Commission had properly adopted the nonduplication rule. In *Conley Electronics Corp.* v. *FCC*, 394 F.2d 620 (10th Cir. 1968), the local stations were within 60 miles and signals of the distant stations were brought in by microwave. Again, in *Carter Mountain Transmission Corporation* v. *FCC*, 321 F.2d 359 (D.C. Cir. 1963) *cert. denied* 375 U.S. 951 (1963), the distant stations were not licensed to serve nor did they serve the area in question off-the-air. Thus, the cases cited rely either on a principle involving importation of signals into an area by microwave to govern receiption of signals off-the-air or on their facts involve the use of microwave to import distant signals into an area where the signals could not be received off-the-air.

[8] The theory of unfair competition relied on by the Commission to support this rule has been repudiated by the Department of Justice (Petitioners' Brief below, n. 35). Fractionalization of audience by distant station duplication of local network signals, has existed in AM radio almost from the beginning without apparent economic harm to the local station.

higher power in a given community. The power asserted is the power to prohibit a cable antenna television system from receiving directly, off-the-air on its master antenna and distributing to the public the signals of television stations which the public may easily receive directly off-the-air on antennas individually owned, simply because it duplicates a network program carried by a higher priority station.[9] The reason assigned for asserting the authority to impose program exclusivity or nonduplication of programs must be grounded in the ancillary authority of the Commission recognized under Section 152(a) of the Communications Act of 1934, as amended.

There is no inherent authority in the Commission, independent of Congress, to regulate television or cable television. It is necessary, therefore, to look to the Act, the source of the Commission's authority, for guidelines on its responsibility for television broadcasting and the way in which this regulation, requiring the blackout of programs otherwise receivable, is or is not *ancillary* to those responsibilities—not merely in terms of protection of broadcasting, which is highly questionable, but also to the advancement of the objectives of the Communications Act of 1934, as amended.

The purpose of the Act is to make available an efficient *wire* and *radio* communications service (Section 1) and to maintain control over all channels of radio *transmission* (Section 301). The Commission, among

[9] Petitioners filed numerous sworn statements with the Commission demonstrating that, while WHAG-TV had a *stronger* ("higher priority") signal than WRC-TV, WHAG-TV's equipment and staffing are such that the *quality* or *fidelity* of its transmissions are constantly inferior to those of WRC. Hence, when the public receives only WHAG-TV, it receives an inferior signal. The accuracy of those claims and sworn evidence was never rebutted.

other things, has authority to generally encourage the larger and more effective use of radio in the public interest (Section 303(g)); to make such rules and regulations to carry out the Act (Section 303(r)); and to require television receivers to be capable of receiving all frequencies allotted to television broadcasting (Section 303(s)). The Act sets forth a comprehensive regulatory scheme, including provisions for the allocation of frequencies, construction and licensing of broadcast stations, renewals, modifications, revocations or denials and assignment and transfers of station licenses.

No provisions of the Act, directly or indirectly, give the Commission the power to control reception of radio signals, except Section 605. This section specifically provides that it,

> "shall not apply to the receiving, divulging, publishing, or *utilizing the contents* of any radio communications which is broadcast or transmitted... for the use of the general public...." (Emphasis supplied.)

Thus, the Communications Act of 1934 does not provide any authority to blackout signals of one station because it overlaps the signal of another station that carries a duplicating program. Television, by its very nature, is licensed to serve the public as far as its signal can be received off-the-air.

The Commission may control the frequency, hours of operation and power of a television broadcast station, but once having licensed a station, it has no power to prohibit the public from tuning in that station on its receivers or to regulate television antennas or receivers, except as provided in Section 303(s) of the Act (All-Channel Receiver Law).

It would appear to be beyond dispute that the Commission has no power to prohibit the public from watching a television program on a signal that a station is licensed to broadcast and which can be received off-the-air. It must, therefore, follow that there is no regulatory function—indeed, it would be a contradiction to prevent a broadcast signal from being received by the public for whom it was intended. Likewise, it would be a contradiction to maintain that an off-the-air signal can be denied to members of the public for whom it was intended because they use a *rented* antenna instead of home antenna. Such a contradiction in rules obstructs, instead of furthers, the objectives of the Act, i.e., the larger and more effective use of radio and the equitable distribution of reception services.

Thus, if this Decision stands, it will confirm power in the Commission to blackout television signals which duplicate network programs—a power which should not be based on the broad *assumptions* made by the court below. If such powers do exist, the rational basis for them, founded in both the Constitution and the statute, should be clearly marked out.

The administrative process requires great flexibility to solve the problems delegated to it by the Congress. The courts have shown an appreciation for this difficult task. However, the problem of adopting an affirmative national policy and regulatory scheme for cable television, in the public interest, is far too important to be left to the uncertain vacillation of the regulatory agency. It should rest squarely on the shoulders of Congress—where it belongs.

Congress first declined to act on cable television in 1959. Although many sessions of Congress have intervened, there is still little prospect of CATV regulatory

legislation without a real or imaginary crisis. During this 13-year period, no fewer than fourteen [10] bills have been introduced in Congress to regulate CATV—to no avail. In broadcasting, the regulatory scheme is fully set forth in the law—Congress erected sign-posts throughout the Communications Act of 1934, as amended, as to the application of the statutory standard of "public interest, convenience and necessity." In the explosive growth of cable television, it may indeed be tragic if Commission improvised patchwork policies, under a broad authority, are permitted to govern or restrict this important industry. Moreover, if some way is not found to encourage Congress to "take hold of the future" and establish affirmative policy for the regulation of this dynamic cable communications service, with its almost unlimited potential, it could be a great disservice to the public.

The Decision Below Sustains a Nonduplication Rule Which Violates Sections 1, 301, 303(g) and 307(b) of the Communications Act of 1934, As Amended.

Section 74.1103(e) of the Commission's rules violates Sections 1 and 307(b) of the Communications Act of 1934, as amended. In the *Southwestern* case, [11] *the Court was not concerned with the validity of the CATV*

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[10] S. 2303, S. 2653, 80th Cong., 1st Sess.
S. 1044, 87th Cong., 1st Sess.
H.R. 14454, 88th Cong., 2d Sess.
H.R. 7715, 89th Cong., 1st Sess.
H.R. 12914, H.R. 13286, H.R. 14201, 89th Cong., 2d Sess.
H.R. 10268, H.R. 10510, 91st Cong., 1st Sess.
S. 3635, 91st Cong., 2d Sess.
S. 792, S. 2327, 92nd Cong., 1st Sess.
H.R. 15757, 91st Cong., 2d Sess.

[11] *United States* v. *Southwestern Cable,* 292 U.S. 157 (1968).

rules,[12] but, rather, with the Commission's authority under the Communications Act to regulate CATV systems. In the *Midwest* case,[13] the Court held that the cablecasting or origination rule "... preserves and enhances the integrity of broadcast signals and, therefore, is 'reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting.' "

The Court determined in *Southwestern* that the Commission has the authority, under the public-interest standard, to regulate CATV [14] in a manner not inconsistent with law. It is, therefore, necessary to determine whether the Act contains guidelines for the exercise of this authority—as it does for the other services that the Commission regulates.

The Commission has determined that CATV is neither a common carrier, which would subject it to Title II, nor broadcasting, which would subject it to

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[12] *Supra,* n. 11, the Court stated:

"We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission are *not* now before the Court."

[13] *United States* v. *Midwest Video Corporation,* — U.S. — (June 7, 1972)

[14] *Supra,* n. 11, the Court said:

"There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under Section 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law', as 'public convenience, interest or necessity require', 47 USC § 303(r)."

Title III.[15] The fact is that there are no provisions of the Act specifically designed for the affirmative regulation of CATV. The only apparent benchmark is the following portions of Sections 1, 301, 303(g) and 307 (b) of the Act.

Section 1 of the Communications Act of 1934, as amended, states the purpose of the Act, as follows:

> "For the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide *wire and radio communication* service with adequate facilities . . ." (Emphasis supplied.)

Section 301 of the Act provides, in part, as follows:

> "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio *transmission; . . .*" (Emphasis supplied.)

A review of the Act discloses no provision that broadcasting shall be "the chosen service", that wire services are subordinate or supplementary to it, or that wire is only an auxiliary of radio. Moreover, there is no section of the Act that gives the Commission authority over the reception of broadcast signals. To the contrary, *wire and radio are placed on an equal footing to achieve this fundamental purpose of Congress in building a rapid, efficient, Nation-wide and world-wide radio communications service,* and the regulatory scheme relates entirely to *transmission* (except for all-channel receivers) and not to *reception.*

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[15] *Second Report and Order* in Dockets 14895, et seq., 2 FCC 2d 725 (1966), paras. 15-17 and authorities cited.

Section 303(g) of the Act provides that the Commission shall,

> "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;"

Section 307(b) provides as follows:

> "(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Nowhere in the legislative history is there any indication that the words "radio service" did not continue to include both transmission and reception as specifically set forth in Section 9 of the Radio Act of 1927.[16] One is of little value without the other. In fact, the Commission has so recognized it from time to time.[17]

The fact that cable television or CATV materially aids the public in receiving broadcast signals and is in furtherance of the *public's right to receive signals,* which the Commission's *allocations policies* intend them

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[16] Radio Act of 1927, Public Law No. 632, 69th Cong., Sec. 9.

[17] For example, in *Pinellas Broadcasting Company* v. *Federal Communications Commission,* 13 RR 2058, 2061; 230 F.2d 204 (D.C. Cir. 1956), the court stated, in requiring a fair and equitable distribution of service, that Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression. The rules and regulations of the Commission and its decisions demonstrate that it so regards the section.

to receive, is the most flagrant form of discrimination and frustrates Section 307(b) of the Act. Section 74.1103 conflicts with Section 307(b); it arbitrarily prohibits the public from receiving a signal intended for its use via CATV. *It arbitrarily controls reception.*

For the foregoing reasons, Section 74.1103(e) is unlawful—at least insofar as it prohibits the carriage of signals that are readily available off-the-air. It is perhaps the most unwarranted and onerous of the restraints on the growth of CATV devised by the Commission and is in violation of Sections 1, 301, 303(g) and 307(b). As an unlawful discrimination against wire and in restraint of a fair and efficient allocation of a valid and proper reception service, it fully warrants review by the Court.

The Nonduplication Rule, in Contrast to the Policy of the Report and Order in Docket No. 16041, Is So Discriminatory as To Constitute a Violation of the 5th and 14th Amendments to the Constitution.

Section 74.1103(e) (now 47 CFR § 76.91) of the Commission's rules establishes a network nonduplication program rule for CATV systems in small areas and populations, based upon a system of priorities of signal strength contours. This is in direct contrast to the policy of licensing overlapping network affiliates[18]

[18] The Commission's *Television network rule* provides city of assignment exclusivity with no nonduplication protection. 47 CFR 53:658 provides:

> "Territorial exclusivity. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, or which *prevents or hinders another broadcast station located in a different community from broadcasting any programs of the network organization.* This regulation shall not be construed to prohibit any contract, arrangement, or understanding be-

in a different community and of encouraging and, in fact, coercing networks to affiliate with small market television stations which duplicate network programs of any number of other affiliates of the same network to larger areas and populations.

The discrimination involved in the operation of the rule against CATV systems and its subscribers is so gross as to constitute a violation of the explicit concept of equal protection of the laws of the 14th amendment, as embodied in the "due process of law" provision of the 5th amendment.

Sections 74.1103(e) and (f)[19] make it clear that the Commission fully intends that the public shall not be entitled to use cable television to receive programs which the Commission has licensed a broadcast station to deliver to them; that the public must use and improvise their own antennas—even though located within a service contour expressly provided by the FCC or beyond those contours but well within reception range of the station—is the governing issue before this Court.

The court below has conceded:

> "The CATV systems accurately observe that Docket 16041 fosters simultaneous duplication of network fare in some areas." (Slip Opinion, p. 7)

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tween a station and a network organization pursuant to which the station is granted the *first call in its community* upon the programs of the network organization. As employed in this paragraph, the term "community" is defined as the *community specified in the instrument of authorization* as the location of the station." (Emphases supplied.)

[19] Section 74.1103(e) provides that any system (which operates within the Grade B or higher priority contour of any television station) shall, upon request, maintain that station's exclusivity as a program outlet against lower priority, duplicating signals. Section 74.1103(f) provides that a CATV system shall, upon request of a station entitled to such exclusivity, refrain from duplicating any broadcast by such station on the same day.

But, the court continued, since the Commission "has not yet adopted any rule requiring a network to duplicate its programs in Winchester or Front Royal through multiple station affiliations," the court need not decide whether or not the Commission has unconstitutionally discriminated against CATV by precluding (via 74.1103) similar duplications. Since WHAG-TV's network affiliation took place while the proposed rule was pending in Docket 16041, it is evident that the effect of the pending rule-making and the Commission's Docket 16041 "policy" had the same effect as a "rule". Hence, the court purged the Commission's conduct, or avoided judging it, because, the Commission used the administrative device of adopting a "policy" rather than a fixed rule. In so doing, the court may well be encouraging the Commission to adopt other unlawful requirements—provided that they are characterized as "policies" and are thought to be safe from judicial scrutiny. Clearly, however, the Commission's administrative policy is a rule within the meaning of 5 USC 551(4)[20] and is reviewable as such.[21]

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[20] 5 USC 551 (4) provides as follows:

> "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ."

[21] In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967) the Court laid down the test of whether an administrative determination is ripe for review. The Court said:

> "Without undertaking to survey the intricacies of the ripeness doctrine [15] it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has

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[15] See 3 Davis Administrative Law Treatise, c. 21 (1958); Jaffe, Judicial Control of Administrative Action, c. 10 (1965). [p. 413 for instances of FCC "jawbone" administration.]

Perhaps the leading case on the applicability of equal protection of the laws clause of the 14th amendment to the due-process clause of the 5th amendment is *Bolling* v. *Sharpe*.[22] In this case, the Court upheld the challenge to the validity of segregation in the public schools of the District of Columbia. The Court noted that the 5th amendment which is applicable to the District of Columbia does not contain an equal protection clause as does the 14th amendment which applies to the States. The Court said,

> ". . . But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."[23]

An earlier case, *Neild* v. *District of Columbia*[24] involved a tax on the gross receipts of sales of fruits and vegetables. There, the Court said,

> "To the extent that the 'equal protection of the laws' exist in the District of Columbia it depends

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been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

See also *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418-419(1941) FCC Network Rules; *Hearst Radio, Inc.* v. *FCC*, 167 F.2d 225 (1948) FCC Bluebook on Programs; *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, (1971) FCC Renewal Policy.

[22] 347 U.S. 497 (1954)

[23] Footnote omitted.

[24] 110 F.2d 246 (D.C. Cir. 1940).

upon the due process clause of the Fifth Amendment and other provisions of the Constitution which are applicable to the federal government. In a sense it may be said that every citizen is entitled to the equal protection of the laws as they may be adopted and administered by the federal government throughout the land."

A number of subsequent cases are to like effect.[25] It is submitted that the discrimination against CATV's reception of duplicating signals is so discriminatory as to constitute a violation of the 5th and 14th amendments to the Constitution of the United States.

CONCLUSION

The issues are of great importance in the administration of the communications laws of the country and well worthy of this Court's consideration and resolution. The Petition for a Writ of Certiorari should be granted.

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[25] *Schneider* v. *Rust*, 377 U.S. 163 (1964); *Bolton* v. *Harris*, 395 F.2d 642, 643 (1968); *Washington* v. *United States*, 401 F.2d 915, 922 (1968); and *Harrell* v. *Tobriner*, 279 F.Supp. 22 (1967).